

BOOK REVIEWS

CASES ON MORTGAGES. By James L. Parks. St. Paul: West Publishing Company. 1926. pp. xiii, 587.

Professor Parks states that the purpose of his book is "to show the student how American courts are dealing with questions in mortgage law." How well does the book accomplish its purpose? The book follows very closely the plan of its predecessors. "Occasionally," however, "the editor has departed from the arrangement of topics and cases usually adopted by other authors."¹ Any attempt to add new devices for instruction, for example, anything like Professor Campbell's experiment with problem cases,² there is not.

But rather than to dwell upon what the book is not, and to criticize and commend accordingly, the reviewer will examine it for what it is — namely, a customary presentation of materials, designed apparently to facilitate conventional legal instruction in this subject.³ What is there traditional in its technique of presenting materials? English cases have been used "only to give a historical background, as a starting point for the student's investigation." "Recent American opinions, which seem to be well reasoned," have been selected for the most part. In Chapter III — Restrictions Upon the Right to Redeem — a conglomerate of fact-transactions is represented in the cases, but the cases are put together "because they involve merely different applications of one great principle." In Chapter V of this book — General Principles Governing Priorities — is to be found a collection of cases which "deal only with general principles, and not with questions of priorities peculiar to the mortgage transaction." These are some of the more general indicia of the traditional teaching-tool in mortgages. They tend to indicate both the "how" and the "why" of its construction. Further search will reveal the traditional "how" more fully. Let us examine Chapter I — The Nature of a Mortgage. It begins with the familiar quotation from *Coke upon Littleton*. Then follows a case where a mortgagee is suing the mortgagor in ejectment, after default.⁴ There had been no demand for possession. Then there is a case where trespass *de bonis asportatis* is brought by a chattel mortgagor against the mortgagee who took possession peaceably before default.⁵ There was no provision in the papers that the mortgagor should have possession. The next case briefly reports that an issue was made as to whether certain mortgages were fairly cancelled by the mortgagee or whether the mortgagor stole them and made the cancellation.⁶ To this case is appended, in a footnote, a

¹ The material is divided into 13 chapters as follows: I. The Nature of a Mortgage; II. Equitable Mortgages; III. Restrictions Upon the Right to Redeem; IV. Obligations which may be Secured by a Mortgage; V. General Principles Governing Priorities; VI. The Rights and Duties of the Parties Before Foreclosure; VII. Agreements Extending the Time for Performance of the Secured Obligation; VIII. Transfer of a Mortgagee's Interest; IX. Transfer of a Mortgagor's Interest; X. Discharge of a Mortgage; XI. Redemption from a Mortgage; XII. Subrogation, Contribution, and Exoneration — Marshalling Assets; XIII. Foreclosure: (1) By Entry and By Action, (2) By Exercising a Power of Sale. There are liberal annotations with cases "accord," "contra," and "see." Some of the work in the law reviews is cited. An appendix contains the final draft of the proposed Uniform (Real Property) Mortgage Act. The draftsman's notes are omitted.

² CAMPBELL, CASES ON MORTGAGES (1926).

³ For purposes of this review only, the feasibility of a separate course in Mortgages is assumed.

⁴ *Doe ex dem. Roby v. Maisey*, 8 B. & C. 767 (K. B. 1828); PARKS, p. 2.

⁵ *Jameson v. Bruce*, 6 Gill & J. (Md. 1834); PARKS, p. 3.

⁶ *Harrison v. Owen*, 1 Atk. 520 (Ch. 1738); PARKS, p. 5.

note by Hargrave and Butler to *Coke upon Littleton*. It compares the nature of a mortgage at common law with civil law doctrine. Then follows an excerpt from an opinion, which begins: "What is a mortgage?"⁷ Then comes a case where the mortgagor of land sues to recover possession from a third party stranger.⁸ The mortgage was still in force, but the mortgagee had not taken possession. Following this is a case of a civil action by a mortgagor against a mortgagee of land specifically to enforce an oral agreement to release the mortgage notwithstanding the Statute of Frauds.⁹ Then there is a New York case holding that an unpaid mortgage of land was not properly distributed as personal property of the mortgagees—in accord with objections of certain legatees.¹⁰ Following this case is an extensive extract from an opinion by Judge Field in a California case¹¹ reporting his observations concerning the nature of mortgages. The statement of facts and part of the opinion are omitted. Following this is a case where a judgment creditor is attacking his debtor's deed of trust as ineffective against him because it was in the nature of a mortgage and was not duly recorded.¹² Another trust deed follows where the borrower-trustor sues somebody in ejectment¹³—who is sued does not appear for part of the statement of facts is omitted. In the last case a mortgagee of cows sues to recover the proceeds of the sale of 87 calves which were in gestation when the mortgage was executed and which were born before foreclosure.¹⁴ Defendant sheriff held the proceeds subject to the validity of the mortgagee's claim as against that of a purchaser from the mortgagor after default. The mortgage papers were silent concerning whether the offspring were included. A footnote to this case contains an extract from an opinion in another case declaring the distinction between a chattel mortgage and a pledge.

What is the design in assembling under this chapter heading such a heterogeneous group of fact-transactions? Why, for instance, are the cases involving controversies over possession found here, when they are also in Chapter VI which deals with the Rights and Duties of the Parties Before Foreclosure? If the business transactions represented in the several cases are of no particular importance, why does not Chapter I—The Nature of a Mortgage—take in Equitable Mortgages (Chapter II)? If the fact-transactions may be scrapped or scrambled, why is not Chapter IV—Obligations which may be Secured by a Mortgage—in this chapter? Likewise, why omit the chapter on Foreclosure or on Redemption? Indeed, if the fact-transactions are subordinate, what part of a case-book on mortgages is to be classified outside of "The Nature of a Mortgage"?

Conceding, however, that one may classify and arrange for what purpose one pleases, we may go to the "why" of the classification, arrangement or plan of presentation of the materials. What is the design of the collection of cases and opinion excerpts in Chapter I? What do they have in common which it is useful to teach to law students? One finds the thread on which these cases are strung in the observations in the opinions concerning the nature of a mortgage. One reads therein that, according to English common law, a mortgage was a conveyance on a condition subsequent; "the legal estate" vested in the mortgagee. Similar common law was made in some of the Amer-

⁷ Plumer, V. C., in *Quarrell v. Beckford*, 1 Madd. 269 (Ch. 1816); PARKS, p. 6.

⁸ *Ellison v. Daniels*, 11 N. H. 274 (1840); PARKS, p. 6.

⁹ *Stevens v. Turlington*, 186 N. C. 191, 119 S. E. 210 (1923); PARKS, p. 9.

¹⁰ *In re Albrecht's Estate*, 130 N. Y. 91, 32 N. E. 632 (1892); PARKS, p. 13.

¹¹ *McMillan v. Richards*, 9 Cal. 365 (1858); PARKS, p. 14.

¹² *Hoffman, Burmester & Co. v. Mackall et al.*, 5 Ohio St. 124 (1855); PARKS, p. 17.

¹³ *Wisconsin Cent. R. R. v. Wisconsin River Land Co.*, 71 Wis. 94, 36 N. W. 837 (1888); PARKS, p. 19.

¹⁴ *Demers v. Graham*, 36 Mont. 402, 93 Pac. 268 (1907); PARKS, p. 20.

ican states. According to equity, however, a mortgage was regarded as "merely a security," and we witness a faltering but progressive tendency of the law courts and all courts to absorb the equitable theory—to disregard the form, to hold that "the title" does not pass, to recognize that the mortgagor is the "real" and "beneficial owner"; that is, to adopt "the lien theory."

Is this information useful to law students as a report on "how the American courts are dealing with questions in mortgage law"? Answer: Yes. But how useful? Is it an accurate report of how American courts are dealing with those questions further than that they sometimes write of these matters in their opinions? Is there a "lien theory" or a "title theory" which can be said to be the reliable reason for the decision of the given case, or which can be relied upon to predict a decision in a subsequent case different on its "facts"? Suppose we think of a purchase-money mortgage of lands or chattels, will the theory or generalization that there is only "instantaneous seizin" or "title" in the mortgagor yield to the theory, announced by the same court in another case, that a mortgage is "merely a lien"? If B desires to buy land or chattels from S and procures A to buy them from S and A pays for them and takes a mortgage thereon from B for the price, may A have "the title" although the given court has declared that a mortgage is really "merely a lien for security"? If X conveys to B in trust to hold as security for bondholders, or to Y by deed absolute in form, may "the title" pass although it is "really a mortgage" and "merely for security" and although the same court has declared in some other cases that "a mortgage" is "merely a lien"? On the other hand, will a court which has declared in other cases that a mortgage of land is a transfer of "the title" according to common law, accord the mortgagor power to execute a valid second or third mortgage of the same premises? The Sales in Bulk Act prohibits, "sale, transfer," etc., of a stock of goods without complying with the statute. Will the fact that a court has heretofore in other cases declared that a chattel mortgage is a "sale" or "transfer" of the title on condition subsequent, rule the decision in a new case involving the question whether a chattel mortgage is included in this statute? Although the real nature of a land mortgage may have been declared to be a "transfer of title," may the mortgagor still be declared "seized of the fee" in another case? And then under either theory or general principle, may not the description of who is "the real owner" depend on the particular case? Even where a statutory provision declared that "the title" was in a chattel mortgagee, is it surprising to find that the mortgagor was held to be a "sole and unconditional owner" under a fire insurance policy? On the other hand, although a court declares its adoption of "the lien theory" and that the mortgagor is "really the owner," will it be surprising to find the same court holding that the mortgagee may be an "owner," for example, under a statute providing for notice to "owners" in condemnation proceedings? Further enumeration of cases might be made to indicate the relativity in usage of these general principles or theories of the "title" and "lien" nature of a mortgage. For some purposes, it appears, a given court will speak of a mortgage as a transfer of "the title"; for other purposes it will refer to a mortgage as a "mere lien." And, of course, in many cases *the nature* (in such terms) will not be discussed at all.

To what extent, then, consume the student's time and energy with these generalizations, general principles, theories of "lien" and "title"? How useful is it for students to know that an American court will sometimes write an opinion to the effect that "the nature" of "a mortgage" is a transfer of "the title" on condition subsequent and at another time that it is "merely a lien"? An answer will be properly forthcoming as follows: that even if "title" and "lien" theories are both used on occasion by the same court, any person who hopes to practice law intelligently and successfully must know of these matters

— these general principles or theories. The courts are using these theories in dealing with questions in mortgage law and from what courts do and say in prior cases we predict what they may do in the new case. Admitting this, precisely as stated, the answer should not be taken for more than it answers. One learns from the reports each day that the courts are not ordinary slot-machines, whether or not we welcome a given decision. Experience is nursing a notion that the courts are judges and that judges have pleasures, pains and other behavior complexes, frequently called emotions, like other human beings. This tends to lead to a belief that a written opinion of judges, like an opinion expressed, orally or written, by persons generally, comes *after* their decision and serves to *describe and report the result*, but may little *explain why or how the decision was reached*. It may, and very probably does, indicate *some* of the influences which came "close to the heart" in making the decision. By this idea, the opinion in a case containing generalizations, general principles, theories, is but a report, in terms of those categories, that they were, or at least may have been, *some* of the influences which were "close to the hearts" of the judges when they voted on the particular case.¹⁵ Clearly, however, these categories were not the only influences to which the judges were exposed in the given case. There was the setting ("the statement of facts" and what-not) of that particular case; the statement of facts and opinions and decisions of other cases, arguments by the particular counsel, etc. Apparently there is no technique known to scientific men which, as yet, will enable one to enumerate, even in one's own deciding, *all* of the influences upon one which are conducive to the making of a given decision. Much more doubtful, would it seem, that one would have any simple formula or method to *explain how or why* others, judges, for example, decided a given case. When it comes to finding a technique or method useful for prophesying how these same persons, judges, let us say, will decide a new case in the future (with its different setting), the problem, quite clearly it would seem, takes on additional complexity. With this thought in mind, the answer under consideration must meet with the suggestion that by instructing students in the general principles or theories written of in opinions with a view of fitting them to meet their career in the practice of law is (1) to tend to oversimplify to them their problems in practice by failing to vitalize to them the general problems of treating with human beings; (2) to tend to mislead them (a) by leaving them ignorant of the fact that they will be concerned with judges who behave as human beings in deciding cases, and ignorant of the complexity of the problem of ascertaining what influenced them to make a prior decision, and what will influence them in making a future decision, and (b) by tending to overstimulate them with confidence that a deduction from what judges said in one case with its setting can be used to fix what they will decide in another case.

The reviewer's criticism of the traditional case-book on mortgages, however, goes one step further. It objects to a teaching-tool which scraps or scrambles the fact-transactions or which isolates into chapter-compartments parts of a single business operation as it is understood in business practice. Why? Because of the objective for legal instruction which the reviewer assumes to be most desirable. This is that the rules of law governing mortgages should be so presented to the students that they may know that while they are studying the decisions, and to some extent theory, they are doing so as a means to an end, namely, to ascertain whether the decisions make mortgages useful or not useful

¹⁵ These statements are not intended to indicate the dogma of fatalism, nor to suggest that the decisions in question are "mere reflex action." It is not intended to overemphasize the process of *rationalization*. It is intended, however, not to let this alleged process pass unnoticed or unemphasized. Intelligent people undoubtedly can tend to believe *pro* and *con* concerning it, pending the results of further research concerning how human beings make decisions.

for the purposes to which they are put in business practice. In terms of ultimate objective it is less a question of learning how the courts are dealing with questions in mortgage law; it is more a question of stimulating inquiry into what kind of job they are doing as measured by the given objective.

For the sole purpose of illustrating his criticism the reviewer will venture to state in briefest outline *a part* of a substitute case-book on mortgages. In selecting materials for the main part of such a case-book the fact-transactions in the cases would assume primary importance; the materials would be selected and arranged according to them rather than according to a theory or general principle of law. They would be classified and assembled according to the business operation presented. Enough cases involving the same business problem would be used to specify, as fully as space and materials permitted, the utility and lack of utility of mortgages in a given business problem — as, for example; assets available for mortgage security borrowing,¹⁶ floating the loan,¹⁷ interference of the outstanding security in transactions by and between the parties during the life of the loan,¹⁸ refinancing, embracing extensions and renewals,¹⁹ payment or other discharge,²⁰ the debt becoming outlawed,²¹ the borrower becoming insolvent or bankrupt.²² But this case-book would not consider mortgages only as a financing tool. Their utility, under the rules of law, would be put up for examination when sought to be used in other ways, for example, by manufacturer, builder or marketing association to secure the supply of raw materials, materials or produce, and by the distributor in securing the distribution of his goods; and thus, "clogs on the equity of redemption" *versus* "agreements for collateral advantage" in some cases would become a live problem of marketing. Introductory to such a presentation of case material on mortgages-in-use, there would be a group of case materials, chosen at random as to the business operation involved, designed primarily to acquaint the student with the various types of paper transactions which the courts treat as "mortgages," for example, deeds of conveyance and bills of sale with the condition subsequent therein and with and without "powers of sale" therein, deeds and bills absolute in form, deeds of trust, "leases," statutory forms, executory agreements and others. Here the student will learn of what is "a mortgage." "Lien theory," "title theory" and other generalizations or principles would be available for consideration in passing, as would be true in the main division above mentioned; the relativity of their usage and their importance as factors in the decisions of judges would come out in connection

¹⁶ Herein, for example, of purchase-money mortgages, mortgages by B on assets bought from S by A for B, mortgages with an after-acquired clause covering future-acquired fixed assets, crops, stock in trade, receivables, future earnings, etc.

¹⁷ Herein, for example, of matters which should be attended to at the time the security documents are executed — cases on rights to possession between mortgagor and mortgagee, coverage of offspring of livestock, use, sale and removal clauses, insecurity clauses, etc.; of other matters — instalment advances, *i.e.*, "future advances," "conditional mortgages," *e.g.*, to secure obligations "when, as, and if" issued, etc.

¹⁸ Herein, for example, cases concerning powers and privileges of user by mortgagor, rents and profits, leases, sales, additional mortgages by mortgagor, his protection against torts of mortgagee and third persons.

¹⁹ Herein, for example, of mortgages for antecedent unsecured indebtedness, cases of agreements to "extend," to "renew," substitution of collateral on "old debt," etc.

²⁰ Herein, for example, of liquidation by cash, obligations not legal tender — third party's notes, surrender of part or whole of the property to mortgagee, etc.

²¹ Herein chiefly of the Statute of Limitations.

²² Herein, for example, of how mortgages can and cannot be used immediately before insolvency or bankruptcy, *e.g.*, giving preferential security; how a discharge affects the mortgage security, etc.

with the main pedagogical purpose of the section. The book would be so constructed on the assumption that the most useful end of legal instruction is to study how the rules of mortgage law render mortgages useful and not useful for particular purposes for which they are sought to be used in the business community. It would be so constructed in order to point out just how a given rule works in a given business transaction, in order to promote an understanding of its effect so that if there is any doubt about its utility a case is clearly stated for research into those business affairs where it has effect.

Lastly, it seems permissible to emphasize, that there can scarcely be a taboo against questioning the traditional teaching-tool and the type of instruction which it facilitates. Our experience in scientifically teaching law in law schools by the case method (which may still be practiced in small classes) is of remarkably recent origin; and still, it is submitted, is to be considered in an experimental stage.

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A TREATISE ON THE LAW OF WILLS. Including Gifts *Causa Mortis* and a Summary of the Law of Descent, Distribution, and Administration. Second Edition. By John R. Rood. Chicago: Callaghan & Company. 1926. pp. ix, 1112.

The first edition of Mr. Rood's book was published in 1904 and was briefly reviewed in the *HARVARD LAW REVIEW*.¹ The first edition contained a total of 701 pages as compared with 1112 in the second edition. The increase in the number of pages is due partly to a considerable extension in the footnotes, citing the more important of recent cases with occasional brief comment, but more especially to additions in the body of the text dealing in particular with election, acceptance, renunciation, powers, and rights of legatees. Occasional sections are added, however, throughout the book. The new edition is printed on good paper in good clear type and presents a pleasing appearance on the whole.

In spite of the criticism that follows, the reviewer believes that this book is by far the best hand-book on wills obtainable and that as a rule it is accurate and reliable for so summary a treatment. There are many features which will prove a help to young lawyers, such in particular as those suggestions contained under the headings "Do These Things" and "These Things Avoid."² An excellent illustration is given of the method to be followed in computing kinship.³ In fact the admirable features of the book are too many to mention in detail. It is clear and readable.

Certain minor defects are found in the book. Is the statement quite true that a gift obtained by fraud is always void? "It does not matter that the person benefited by the provision was not a party to the fraud."⁴ Further, is it true always that the date is no part of the will? "When material the true date may be shown."⁵ It is suggested that the competency of a subscribing witness to a will is a question of fact for the jury. Is not the competency of a young child to attest and subscribe a question of law for the court?⁶ It is said that a will invalidly executed may become valid by republication.⁷ Is not this a problem of incorporation rather than of republication?

¹ (1905) 18 HARV. L. REV. 509.

² §§ 318a, 318b.

³ § 766.

⁴ § 171. See *Anderson v. Bailey*, [1902] 2 Ch. 936. Cf. *Dye v. Parker*, 108 Kan. 304, 194 Pac. 640 (1921), rehearing, 195 Pac. 599 (1922).

⁵ § 173. See *contra: In re Baum's Estate*, 260 Pa. St. 33, 103 Atl. 614 (1918).

⁶ § 312. See *Jones v. Tibbetts*, 57 Mo. 572 (1870).

⁷ § 107.